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IN THE

Supreme Court of the United States

October Term, 1967

No. 975

JAMES SEAGO,

Petitioner,

- against -

NORTH CAROLINA THEATRES, INC., et al,

Respondents.

PETITIONER'S REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO CERTIORARI

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A. IN GENERAL

An examination of the brief of the respondents discloses that it fails to meet squarely most of the facts and all of the law set out in the petition. In addition, it has failed to rebut, or in most instances even discuss, the reasons set out in the petition why it is important that this Court exercise its supervisory power here. In purporting to discuss the evidence of conspiracy, it refers to only a few selected facts from the record. For these reasons it appear useful in this brief not only to discuss the arguments made by respondents, but to call attention to the facts and law in the petition which they completely ignore or avoid.

Preliminarily, it should be noted that there are implications in respondents' brief that because petitioner's initial investment in the Colony Theatre was only $7,500, and because Colony had not been operated as a first-run theatre by Con-

solidated, that it was not satisfactory for first-run operation [RB, pages 5, 21][*1]; The record squarely contradicts any such implication. Respondents' assertion that petitioner purchased the Colony from the defendant Consolidated for $7,500 is flatly wrong [RB, page 5]. Petitioner purchased only the theatre equipment from Consolidated for the $7,500, and operated the theatre on a lease from the landlord. The owner of the building leased the theatre to petitioner, because he was dissatisfied with Consolidated's operation of the theatre [A, page 160]. Naturally Consolidated had not operated Colony on a regular first-run policy, because it operated the first-run Village Theatre in Raleigh and would only have been competing against itself [A, pages 159-160; Pet., pages 5-6].

In the first three years of operation stereophonic sound, 3-D, a new screen were installed, and most of the booth equipment was replaced. The theatre was repainted inside and out, the seats were reupholstered and many other improvements and renovations made [A, 160-161]. All the evidence in the record indicates that the Colony Theatre was comfortable and completely satisfactory for operation as a first-run theatre. This is also generally admitted by representatives of respondent-distributors who had been inside the theatre [A, 160-161, Deft's. App. 399a-401a]. Nor was the seating capacity of the Colony a drawback since its 600 seats were only 50 seats less than the first-run Village Theatre of Consolidated [DB, page 5]. Actual exhibition results at the Colony further demonstrated its suitability for first-run [Pet., pages 14-19]. For example, in 1954 Colony produced a film rental of $12,342 on a gross of $17,161 on Paramount's WHITE CHRISTMAS, and this is the largest film rental paid to any distributor by any first-run theatre in Raleigh set out in the record. When Colony could get the good pictures, it produced excellent results. (A. 158-159, 185-186; Pet. 14-19).

1*In this brief, as in the petition, petitioner refers to his Appendix in the court below as "A". Respondents' brief is referred to as "RB, page ," and the petition is referred to as "Pet., page

Respondent's bland assertion that petitioner was never excluded from the market is plainly contradicted in the record.

It is undisputed that 5 of the respondent-distributors refused to even let petitioner bid at all during certain periods, and that none of them were allowing him to bid at the time he was forced out of business [Pet., pages 8, 26]. Of course, the rejection of petitioner's 153 superior bids, during periods that bidding was conducted, also constituted exclusion of petitioner from the market for the desirable first-run pictures [Pet., pages 9-19].

B. THE AUTHORITIES CITED BY RESPONDENTS ARE INAPPLICABLE TO THE ISSUE.

Respondents make much in their brief over the amendments to Rule 56(c) and (e), stressing that petitioner has not cited cases under Rule 56 decided after the 1963 amendments [RB, pages 7-12]. Respondents' contentions are without merit, since it is clear that the primary purpose of the amendment to Rule 56 (e) was to avoid "[T]he Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment . . . " and it was not " . . . designed to affect the ordinary standards applicable to the summary judgment motion." [See Advisory Committee Notes]. It is clear, therefore, that the amendments have not in any way changed the applicability of decisions of this Court relating to summary procedures cited by petitioner.

Respondents have criticized petitioner for citing "a line of anti-trust decisions which deal with conspiratorial action and other similar violations of the anti-trust laws" [RB, pages 10-11]. However, petitioner attempted to cite antitrust decisions with fact situations as closely analogous as possible to the instant case to demonstrate that evidence of the nature contained in the record in the courts below clearly warranted an inference of conspiracy, and thus presented a genuine issue of material fact for trial.

Respondents, on the contrary, under the heading "Summary Judgment Was The Appropriate Remedy In This Case" has cited cases which are completely irrelevant. The cases relied on, a number of which are antitrust cases, are simply cases where on the particular facts the courts held there was no genuine issue of material fact, and that consequently summary judgment was appropriate [RB, pages 12-16]. In none of those cases were the fact situations similar in any way to the *Seago Case*.

In other ways the respondents err on the law. There was no obligation upon petitioner, as respondents urge, to show "that defendants' employees and former employees had testified falsely on depositions" [RB, page 10]. Where testimony of respondents' employees is contradicted by petitioner's affidavit and documentary evidence, then the issues of credibility must be viewed in favor of petitioner, the party opposing the motion. Furthermore, as indicated by record references, petitioner has relied on many portions of depositions of respondents' employees.

Respondents also err in urging that there is any burden on petitioner to show "that the District Court's findings and conclusions were not supported by the evidence" [RB, page 11]. Here petitioner had claimed a jury trial, and District Court was not sitting as finder of fact. To show error in the courts below petitioner need only show that the evidence and the reasonable inferences from the evidence, viewed in the light most favorable to petitioner, the party opposing the motion, raised a genuine issue of material fact for trial. [See *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464; *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690].

C. RESPONDENTS IGNORE THE FACTS IN THE RECORD.

Respondents purport to discuss the evidence in the record [RB, pages 17-22], but except for a few selected matters,

completely ignore practically all the facts in the record box office value of pictures in a city such as Raleigh are more accurate, because the Charlotte Area rentals fail to take into consideration the fact that some pictures have greater box office value in large towns as opposed to small ones, and vice versa [see Petition, pages 12-13]. Despite their deficiency respondents' area film rentals show petitioner's ability to produce comparable film rentals on pictures of comparable box office value by offering longer playing time and higher percentage terms.

Even these area film rentals demonstrate petitioner's 600-seat Colony to be quite comparable to the 1500-seat Ambassador on the basis of film rental per picture. On pictures $100,000 and over the Colony averaged $5,175 per picture as opposed to $5,559 at the Ambassador. On pictures between $50,000 and $99,000 the Colony averaged a film rental of $2,945 per picture, as opposed to $2,991 per picture at the Ambassador. On pictures between $25,000 and $49,000 in Charlotte Area film rental, the Colony Theatre averaged $1,640 per picture, as opposed to $1,527 at the Ambassador. On pictures under $25,000 the Colony averaged a film rental of only $363 per picture, as opposed to $723 per picture at the Ambassador. However, the average Charlotte Area film rental of the Ambassador pictures was $17,000 or almost twice as good as the Colony's $10,000 [See Defendants' Appendix, page 902a, specifically relied upon in their brief at page 18]. The average length of exhibition at Colony was longer than at the Ambassador, but many of petitioner's 153 rejected superior bids are pictures on which petitioner offered two or three times as much playing time [A, pages 77-154]. In most instances, petitioner also offered a higher percentage of film rental. It is undisputed in the record that the superior bid is determined by total film rental per picture, and not average daily film rental nor average daily gross [A, pages 171, 316, 353, 354; Pet., pages 14-15].

Nor are petitioner's superior bids based solely on a comparison of longer playing time and higher percentages "to

the complete exclusion of all other relevant factors," as respondents assert [RB, pages 18-19]. The actual performance record at the Colony Theatre on the comparatively few good pictures which it exhibited first-run demonstrates its ability to produce superior film rentals by offering longer playing time and higher percentages [See Petition, pages 14-18]. This evidence is ignored by respondents. For example, the film rental paid MGM by Colony for the exhibition of GIGI was superior to that paid by the Ambassador or by the Village Theatres on 13 pictures which were better pictures according to respondents' area film rentals [see Petition, pages 15-16]. This superior film rental on GIGI was produced by Colony by offering longer playing time and higher percentage terms [Pet., page 16], and this is exactly what the petitioner did on the 153 rejected superior bids [A, pages 77-154]. Some of these rejected superior bids have been summarized for the convenience of the Court in Appendix D to the Petition [page 71].

It should be noted that respondents have not, and cannot, deny that petitioner was generally licensed inferior first-run pictures [See Petition, pages 11-14]. This is demonstrated both by petitioner's Second Affidavit [A, pages 163-171], and respondents' area film rentals [Defendants' Appendix, page 902a]. Significantly, respondents have failed, just as did the courts below, to discuss or compare the rental terms offered on even one of petitioner's 153 claimed superior bids. Nor is respondents' assertion that the superiority of the bid is based on hindsight correct [DB, pages 18-19], since the distributor would have had the bids in front of him at the time of the award of the picture, and the superiority of Colony's terms would be just as evident then as it is today. In addition, this comparison of bids which respondents and the District Court have called "speculation" [DB, page 18] is exactly the function which the distributor admits he should perform in determining the winning bid [A, pages 302-304, 350, 353-354, 427].

Respondents' brief also ignores the evidence that 5 of the respondent-distributors failed to allow petitioner the right to bid at all during portions of the period from 1958 through 1960, and the effect of that evidence as proof of conspiracy [Pet., pages 8-9, 26]. Respondents also completely ignore, as did the opinion of the District Court, that petitioner's evidence was probative of vertical conspiracy as well as horizontal [Pet., pages 27-28].

Respondents have failed to comment on the fact that summary judgment was granted as to 4 respondent-distributors (Allied Artists, Warner, Universal and United Artists), for which obviously conclusory affidavits were filed (A 117; 132, 176; DA 64a), but for which respondents filed no rebutal tabulations such as they filed with MGM, Paramount and Fox [A, pages 568-594; see Petition, page 28]. For example, with the distributor Allied Artists, the record is undisputed that petitioner was denied competitive bidding at all during the entire period of his operation from 1953 to 1960, until the last 2 months of 1960. This was despite written requests in 1954, 1955, and 1957 [A, pages 549-553]. Certainly, in failing to find this constituted evidence of vertical conspiracy between respondent Allied Artists as a distributor and the respondent-exhibitors operating the Ambassador Theatre, which had the first choice of Allied Artists' product without any bidding, the court below was in direct conflict with the decision of the Tenth Circuit in *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir. 1955).

Based on petitioner's ratings of MGM, Paramount and Fox pictures, and the testimony of managers of Columbia, Warner and Universal, petitioner was licensed a maximum of 9 top of "A" pictures in total from those 6 distributors from 1958 to 1960 [Pet., pages 11-14]. Since 85 superior bids of petitioner were rejected during that same period [Pet., page 10], respondents' argument is indeed novel that the licensing of some top pictures to petitioner "is wholly inconsistent

with any theory of conspiracy based upon an evaluation of competing bids." The argument is unsupported by law or logic. If the figures were reversed, and petitioner had been licensed 85 top pictures, and 9 superior bids had been rejected during the same period, the argument might have a little more merit.

In discussing the evidence regarding split of product [DB, pages 19-20], respondents do not contradict the existence of the split, its *per se* illegality, or the acquiescence of the distributors [Pet., pages 31-36]. They attempt to argue that it did not affect petitioner's ability to secure pictures [DB, page 20]. However, they simply have not contradicted the evidence of the effectiveness of the split set out in the Petition [pages 22-35], demonstrating that the Ambassador and State Theatres, when petitioner's superior bids were rejected, were licensed 70% and 80%, respectively, of the pictures of the respondent-distributors upon their respective sides of the split. Nor have they rebutted the fact that the insulation of the Ambassador and State Theatres from competition from each other increased their respective bargaining positions in the split markets of each [Pet., pages 22-23].

Respondents urge that petitioner was awarded more of the Paramount and MGM pictures for which he bid, than the Ambassador [DB, page 20]. They fail to point out that of the pictures in the "A" and "B" categories of Paramount, MGM and Fox, petitioner's affidavit establishes that Colony was licensed only 10, while Ambassador was licensed a total of 42 [Pet., page 11].

(2) Respondents' Arguments Regarding Impact of Television Are Without Basis.

Respondents' arguments "as to proximate cause" that television, rather than alleged antitrust violations, was the cause of Colony's lack of success [DB, pages 20-21], are without support in the record. There is not an iota of evidence in the record tying in statistical figures with regard to television

sets in Raleigh with petitioner's Colony Theatre or any other theatre in Raleigh. Obviously, if petitioner's Colony grossed $80,271 in 1958 under "the full impact of television" (RB, page 21), the reduction to $26,493 in 1960 [A, page 71] had nothing to do with the impact of television. Of course, petitioner's ratings of box office value of pictures established that petitioner was licensed all 6 of its "A" pictures from MGM, Paramount and Fox in 1958, and none in 1959 or 1960 [A, pages 163-171, 570-576, 580-581, 585]. Furthermore, pictures such as BUCCANEER and HOUSE BOAT were exhibited in late 1958 at the Colony Theatre with excellent admission receipts, demonstrating that good do well at the Colony despite any impact from television [Pet., pages 16-17]. Nor is there any evidence in the record to suggest that television would have a greater impact on Colony than other first-run theatres.

(3) The Evidence Of Damage Was Sufficient.

Contrary to the assertions of the respondents [RB, pages 21-22], there is ample evidence in the record that petitioner "suffered damage in an ascertainable amount."

Numerous decisions have pointed out the value to a theatre of first run or other early run pictures. See, for example: *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166-67; *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 266.

Here, petitioner has offered evidence that he was denied by conspiracy a large number of the better pictures of respondent-distributors on which he made superior bids, and was generally required to play inferior pictures. His second Affidavit rated box office values "A", "B", "C", "D", and "E" of the pictures of MGM, Paramount and Fox exhibited at Colony from 1958 through 1960, and those exhibited at the Ambassador, State and Village Theatres on which petitioner's superior bids were rejected [A, pages 575-588]. Those tables

demonstrate that the "A", "B" and "C" pictures at the Colony Theatre generally resulted in a profit after deduction of the film rental paid and a weekly overhead expense of $700 [A, page 186]. Contrariwise, those tables demonstrate that the "D" and "E" pictures at the Colony generally resulted in a loss after deduction of the film rental and overhead from the gross admission receipts [A, pages 575-588]. For example, out of 19 "D" and "E" pictures of MGM exhibited at the Colony from 1958 through 1960, 16 resulted in a loss from the exhibition. This is computed in Appendix E to the Petition. Since approximately 70% of the MGM, Paramount and Fox pictures on which petitioner's superior bids were rejected were in the "A" or "B" categories, and as a result of being denied those pictures petitioner had to license "D" and "E" pictures, damage is readily apparent.*[2] Furthermore, the record indicates that even the small proportion of good pictures licensed to Colony diminished proportionately from 1958 through 1960 [A, pages 575-576, 580-581, 585]. The impact on petitioner's admission receipts and film rental, and the resulting difference available to pay other operating expenses, is readily apparent [A, page 71]:

2*Respondents argue that petitioner could not have exhibited all the pictures he claims should have been licensed to him, because he was "licensed and exhibited Metro, Paramount and Twentieth Century Fox pictures on 894 of the 1096 days available during 1958, 1959, and 1960 (the maximum damage period — assuming damage)." (RB, page 20). Of course, this argument, even if valid, would go to the amount of damage only, and not to the fact of damage or the evidence of conspiracy. However, the argument completely neglects the fact that more than 70% of the pictures of those three distributors licensed to petitioner were "D" od "E" pictures, which no exhibitor would ever play if something better was available (Pet., pages 11-12). Almost invariably they would lose money (See Appendix D to Petition). On the other hand, of the pictures on which petitioner's superior bids were rejected more than 70% were in the "A" or "B" category (Pet., page 11). Clearly, if petitioner had been licensed these better pictures, to which his superior bids entitled him, he would not have sought to license most of the undesirable "D" and "E" pictures actually exhibited at Colony (Pet., page 11; A 187). Respondents' Charlotte area film rentals also substantiate this. Of the 72 pictures of Metro, Paramount and Fox licensed to petitioner, only 12 were in the category of $50,000 or more in area film rental, but of the 46 pictures of those distributors on which petitioner's superior bid was rejected, 39 had an area film rental over $50,000. Petitioner actually exhibited 46 of a total of 72 pictures of those distributors with an average area film rental of only $10,000 (See Defendants' Appendix, page 902a).

1958		
Gross Receipts		$80,271
Film Rental		$39,558
	Difference	$40,713
1959		
Gross Receipts		$51,719
Film Rental		$28,231
	Difference	$23,488
1960		
Gross Receipts		$26,493
Film Rental		$19,881
	Difference	$ 6,612

Again respondents ignore the record by stating "[T]here are no opinions, expert or otherwise and whether valid or worthless, as to petitioner's damage, if any, in his operation of the Colony." [DB, page 21]. In his answers to interrogatories of the respondents, petitioner estimated the gross admission receipts, film rental expenses and advertising expenses of the Colony Theatre for each of the years 1958, 1959 and 1960, if he had been allowed fair and equal access to first-run pictures of the respondent-distributors. He estimated the resulting damages as follows: 1958, $66,000; 1959, $84,500; and 1960, $98,000 [A, pages 65-73]. In view of his experience, knowledge, familiarity with the Raleigh theatres, and study of the documentary records, petitioner was clearly qualified and competent to so testify. He was never cross-examined nor his testimony impeached in any way, and respondents failed to offer testimony of any counter-expert to the contrary. See: *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.* (8th Cir.) 194 F. 2d 846, 855-6; *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.*, (2nd Cir.) 176 F. 2d 594, 597; *Sablosky v. Paramount Film Distributing Corporation* (E.D. Pa) 134 F. Supp. 929, 936;

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406-408; *Rankin Co. v. Associated Billposters* (2nd Cir.) 42 F. 2d 152.

D. REASONS FOR GRANTING THE WRIT.

It is submitted that the petition in this case demonstrated that the facts in the record in the courts below, as tested by applicable antitrust authorities amply warranted an inference of conspiracy of the respondents, and the decisions of the court below were therefore erroneous. As pointed out in the foregoing sections of this brief, the respondents' brief has not effectively challenged either the facts or the law. It is submitted that it is quite clear on the record that the courts below have seriously ignored the summary judgment procedure, and that this Court should grant certiorari in order to forbid such encroachments on the right of trial by jury.

The respondents' brief does not discuss at all the other reasons stated by the Petition why petitioner believes that it is important that this Court exercise its supervisory power. Respondents deny that a conflict exists among the circuits and with this Court [DB, page 2], but does not discuss or challenge the decisions which demonstrate that conflict [Pet., pages 23, 29-32]. Respondents' brief does not deny that competitive bidding is a modus vivendi in the motion picture industry, and that this decision, which will undoubtedly be followed by other circuits if allowed to stand, will have the automatic effect of depriving any exhibitor injured by a conspiracy relating to competitive bidding of any recourse to the courts, unless he has direct evidence of conspiracy [Pet., pages 36-40]. Nor have the respondents challenged the fact that if this decision is allowed to stand it will greatly increase the burden of this Court and of the Department of Justice in antitrust enforcement, as set out in the Petition [Pet., pages 40-42]. Respondents have not denied the importance of granting certiorari in this case, because of the prevalence of "splits of product" in the motion picture in-

dustry, and that serious need for clarification of the law relating to market division as a *per se* violation, in view of *Viking Theatre Corp. v. Paramount Film Distributing Corp.*, 320 F. 2d 285 (3rd Cir. 1963, aff'd 378 U.S. 123). The respondents have simply failed to rebut any of the reasons set forth by petitioner why it is important that this Court grant a writ of certiorari in this case.

Respectfully submitted,

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